

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

74-1643

**In The
United States Court of Appeals
for the Second Circuit**

MAX S. GUMER,

Appellant,

vs.

SHEARSON, HAMMILL & CO., INC.; WINSLOW, COHU &
STETSON, INC.; FREDERICK S. NUSBAUM and THE NEW
YORK STOCK EXCHANGE,

Appellees.

**Appeal From The United States District Court
For The Western District of New York**

APPELLANT'S APPENDIX

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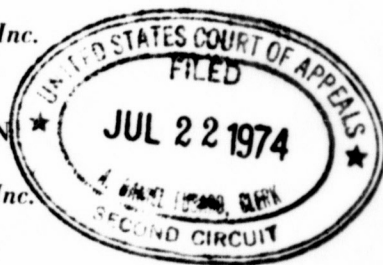
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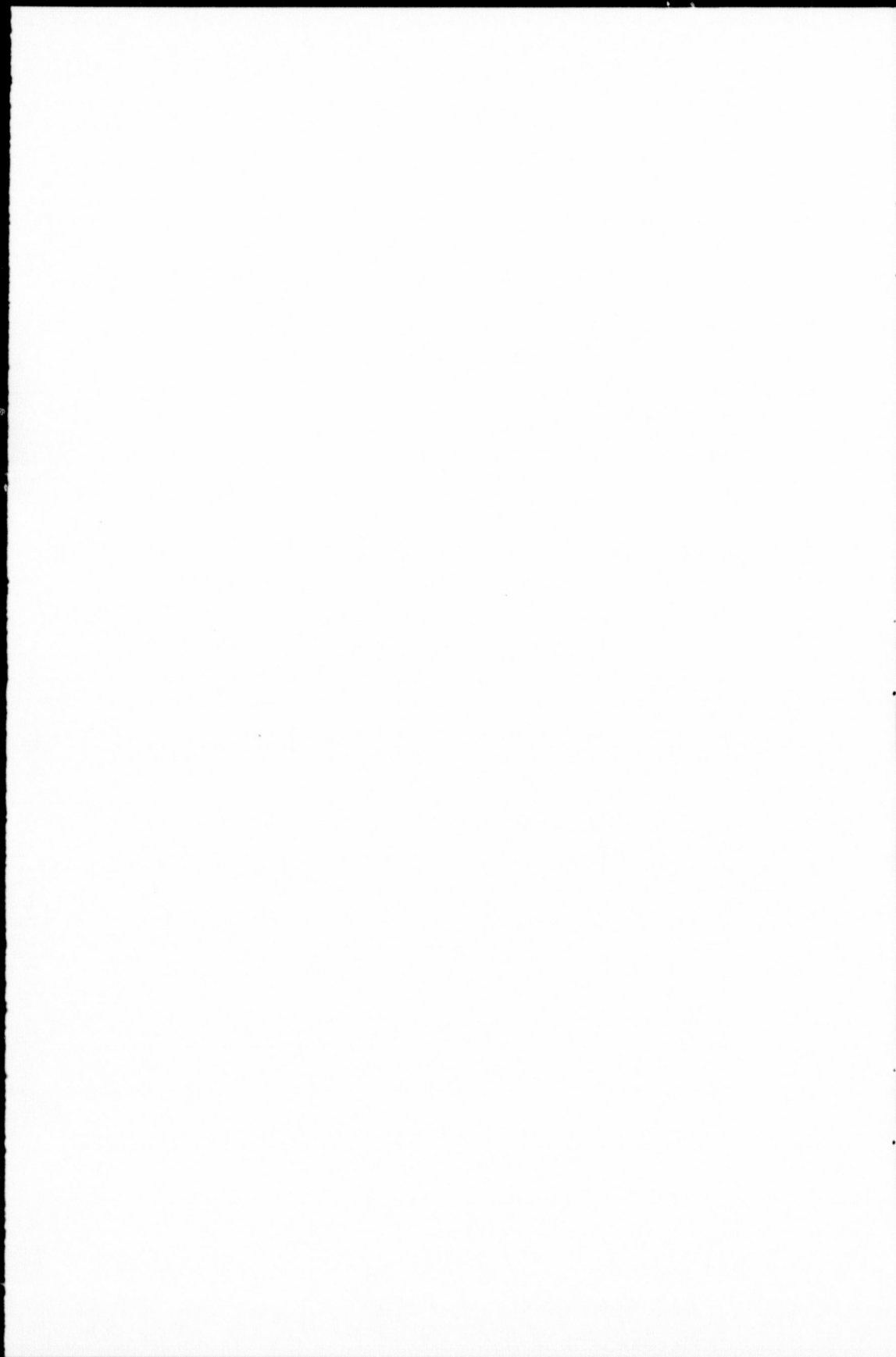
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INDEX

	Page
Complaint	A-1
Defendant Shearson, Hammill & Co., Incorporated's Motion to Dismiss	A-22
Notice of Motion	A-23
Affidavit of Philip J. Hoblin, Jr.	A-24
Exhibit A — Margin Account Agreement	A-27
Affidavit of David W. Kelly	A-29
Exhibit A — Letter of David W. Kelly dated February 9, 1971	A-30
Exhibit B — Letter of Max S. Gumer dated February 17, 1971	A-32
Affidavit of Roger G. Richard	A-33
Exhibit A — Margin Account Agreement (Same as printed herein at page 27)	A-34
Decision and Order of Hon. Harold P. Burke	A-35
Notice of Appeal	A-39



United States District Court

WESTERN DISTRICT OF NEW YORK

MAX S. GUMER,

Plaintiff.

vs.

SHEARSON HAMMILL & CO., INCORPORATED,
WINSLOW, COHU & STETSON, INCORPORATED,
FREDERICK S. NUSBAUM and THE NEW YORK
STOCK EXCHANGE,

Defendants.

71 Civ. No. 72

COMPLAINT

Plaintiff by his attorneys, Wiser, Shaw, Freeman, Van Graafeiland, Harter & Secrest, respectfully alleges and shows to the court as follows:

JURISDICTION AND VENUE

FIRST: This action arises from securities fraud in violation, in part, of Sections 6, 7, 10b, 15c, 19 and 20 of the Securities and Exchange Act of 1934 and in further violation of Rule 10(b)-5 of the Securities and Exchange Commission (hereinafter referred to as SEC) and in further violation of Rules 405 and 431 of the New York Stock Exchange and of the laws of the State of New York.

SECOND: This court has jurisdiction of this action pursuant to 28 U.S.C. 1331 and pursuant to Section 27 of the Securities and Exchange Act of 1934 (15 U.S.C. 73j).

Complaint

THIRD: Plaintiff is a resident of the Western District of New York and the acts, or some of them, constituting the violations of law hereinafter complained of, took place within the Western District of New York.

PARTIES

FOURTH: Plaintiff is now and at all times was a resident of the Western District of New York and more particularly of the County of Monroe, New York.

FIFTH: Defendant, Shearson Hammill & Co., Incorporated (hereinafter referred to as "Shearson") now is and at all times herein mentioned was a foreign corporation duly authorized and qualified to do business in the State of New York and was a member firm of defendant New York Stock Exchange duly licensed and controlled under and by the laws of the State of New York, the federal securities laws and the rules and regulations promulgated thereunder and by the rules and regulations of the New York Stock Exchange, maintaining its principal place of business in the State of New York with a branch office and place of business within the Western District of New York, more specifically within the City of Rochester, New York.

SIXTH: Defendant, Winslow, Cohu and Stetson, Incorporated (hereinafter referred to as "Winslow") was at all times herein mentioned and, upon information and belief still is, a foreign corporation duly qualified and authorized to do business in the State of New York and was a member firm of defendant New York Stock Exchange duly licensed and controlled under and by the laws of the State of New York, the federal securities laws and the rules and regulations promulgated thereunder and the rules and regulations of the New York Stock Exchange, maintaining its principal place of business in the State of New York with a branch office and place of business within the Western District of New York, more

Complaint

specifically within the City of Rochester, New York; upon information and belief defendant Winslow ceased to do business on approximately October 1, 1969, under some arrangement with defendant New York Stock Exchange and various other of the said Exchange member companies, the exact details of which are at present unknown to this plaintiff.

SEVENTH: Defendant New York Stock Exchange (hereinafter referred to as "N.Y.S.E.") is now a not-for-profit corporation and at all times herein mentioned was, upon information and belief, a membership corporation organized and existing under and by virtue of the laws of the State of New York or duly qualified and authorized to do business therein and maintaining its principal place of business therein. Defendant N.Y.S.E. was further organized and registered pursuant to Section 6 of the Securities Exchange Act of 1934 (hereinafter called the "1934 Act") and existing under and by virtue of the said Section and the rules and regulations promulgated thereunder.

EIGHTH: That defendant Nusbaum is and at all times hereinafter mentioned was a resident of the Western District of New York and was until some time in August or September of 1969, a Vice President of defendant Winslow and the Manager of defendant Winslow's Rochester office.

FACTS: DEFENDANT NUSBAUMS REPRESENTATIONS WITH RESPECT TO THE GUARANTEE AND THE ACCOUNTS

FOR A FIRST COUNT AGAINST DEFENDANTS NUSBAUM AND WINSLOW IN FRAUD

NINTH: That prior to July 29, 1969, plaintiff maintained one or more accounts with defendant Winslow including a margin account at said defendant's Rochester office having a net asset value of in excess of Two Million Dollars (\$2,000,000) and a margin of approximately sixty-five percent (65%).

Complaint

TENTH: That on or about the 29th day of July, 1969, plaintiff was advised by defendant Nusbaum, then acting in his capacity as vice president and resident manager of the Rochester office of defendant Winslow, that two certain margin accounts in which plaintiff had no interest (hereinafter referred to as the "P.R. and L.G." accounts) were under margin and would require certain cash deposits or certain liquidation sales therefrom. Defendant Nusbaum represented to plaintiff that if plaintiff would execute a certain document proffered to him, it would not be necessary to sell any securities from the P.R. and L.G. accounts and no further margin calls would be necessary for a period of two months.

ELEVENTH: Defendant Nusbaum further represented to and advised the plaintiff that the execution of the said document would have no affect upon plaintiff's own accounts and would not jeopardize them in any way nor subject them to liability; in fact, defendant advised plaintiff that it was not even necessary to read the said document which was offered to plaintiff for signature, but rather explained that the document was a simple guarantee the purpose of which was to satisfy certain technical rules of the Stock Exchange with respect to the P.R. and L.G. accounts, and defendant Nusbaum further assured plaintiff that there would be no further margin calls nor requested sales from any of the three accounts for at least two months thereafter and that, in no event, would plaintiff's own account be subjected to the liability of liquidation at any time because of the execution of the guarantee.

TWELFTH: That at the time defendants Nusbaum and Winslow made the said representations to the plaintiff the said representations were false and the said defendants knew or should have known that they were false. In fact, upon information and belief, at the time of the representations and of the execution of the said guarantee, the P.R. and L.G. accounts were in actual deficit, and the combined accounts were, for

Complaint

margin purposes, already under margin or so close thereto, that the execution of the guarantee could not eliminate the necessity for further margin calls or liquidations.

THIRTEENTH: That the said representations were further false and untrue because the guarantee agreement which plaintiff was induced to sign and did was intended by defendants Nusbaum and Winslow to pledge and combine for margin calculation purposes plaintiff's accounts together with the P.R. and L.G. accounts and subjected plaintiff's accounts to liability and liquidations, as if all accounts were combined, a fact unknown to the plaintiff.

FOURTEENTH: Defendants Winslow and Nusbaum made the said representations to the plaintiff with the intent to deceive and defraud him and to induce him to act in accordance with the said representations and to execute the said agreement; in reliance upon the said representations and without knowledge or reasonable grounds to gain the knowledge that the representations were untrue, and without receiving consideration therefor, plaintiff signed the guarantee agreement without reading it and in complete reliance upon the representations of the defendants, which plaintiff never would have done but for the said representations.

FIFTEENTH: That despite the representations as hereinabove mentioned, on the 1st day of August, 1969, plaintiff received a telegram from defendants Winslow and Nusbaum which read as follows:

"Since you are guaranteeing the account of Lewis Gumer and also Mrs. Pauline Rosenberg, we will require a deposit of \$760,000. If payment is not received by 12:00 noon on August 4, 1969, we reserve the right to sell four times the amount of securities or liquidate your entire account."

Complaint

SIXTEENTH: Immediately upon receipt of the said telegram, plaintiff contacted defendant Nusbaum whereupon defendant Nusbaum represented that he was unaware of the said telegram and further that the said telegram was probably sent from defendant's New York City office in error. Defendant Nusbaum further represented that, after investigation, if plaintiff would deliver Four Hundred Fifty Thousand Dollars (\$450,000) to defendants Nusbaum and Winslow such margin calls would cease and there would be no further calls upon any of the aforesaid accounts for at least two months (2) and, at any rate, no further demands for collateral or liquidation of the account of Max Gumer at any time.

SEVENTEENTH: Relying upon the said representations, plaintiff delivered to defendants Nusbaum and Winslow securities fully paid, having a present market value of in excess of Four Hundred Fifty Thousand Dollars (\$450,000).

EIGHTEENTH: That at the time of the aforesaid representation defendants Nusbaum and Winslow knew or should have known that the said representations were false and untrue and that, in fact, no such representations could have been made, and that the combined accounts were already at or below the necessary margin all of which facts were unknown to the plaintiff. The said representations made by defendants were made with the intention to further deceive and defraud the plaintiff and, in ignorance thereof, plaintiff relied upon them. Plaintiff would not have delivered the additional securities to defendants except for his reliance and except for his ignorance of the falsity thereof.

NINETEENTH: That as a result of the aforesaid fraud and misrepresentation, defendant Winslow combined plaintiff's accounts with the P.R. and L.G. accounts for margin calculation purposes and, as a result thereof, defendant Winslow did make further calls and demands upon plaintiff, which plaintiff rejected, and without the consent and over the objection of the

Complaint

plaintiff, said defendant did partially liquidate plaintiff's accounts with loss of principal value therein and so that the plaintiff incurred costs of sales and commissions and other costs, which he would not otherwise have sustained; the partial liquidation of plaintiff's account and the contribution of further capital or securities on plaintiff's part would not have been necessary on the basis of calculations of plaintiff's account alone except for the fraud on the part of the defendant and except for the illegal combination of the aforesaid accounts for margin calculation purposes, by the defendant Winslow.

TWENTIETH: Because of the aforesaid fraud and forced liquidations of plaintiff's account, plaintiff was damaged in the amount of Seven Hundred Fifty Thousand Dollars (\$750,000).

TWENTY-FIRST: Because of defendant Winslow's continued liquidations of plaintiff's accounts, and because of certain facts hereinafter alleged relating to further fraud practiced by defendant Winslow and its employees, plaintiff was compelled by the defendant to execute various agreements and to combine his account with the accounts of P.R. and L.G. and to remove his account from the offices of defendant Winslow to the offices of defendant Shearson, further causing and resulting in the liquidation of plaintiff's entire account, all to plaintiff's damage in the additional amount of One Million Seven Hundred Fifty Thousand Dollars (\$1,750,000).

FOR A SECOND COUNT AGAINST DEFENDANTS NUSBAUM AND WINSLOW IN NEGLIGENCE

TWENTY-SECOND: Plaintiff repeats and realleges each and every allegation contained in paragraphs numbered and styled first through nineteenth.

TWENTY-THIRD: That the acts and representations hereinabove alleged constituted negligence on the part of the defendants Nusbaum and Winslow and defendants Nusbaum

Complaint

and Winslow were further negligent in that they failed to properly supervise their various employees all of whose acts and representations were the proximate cause of plaintiff's damage.

TWENTY-FOURTH: That no act or omission on the part of the plaintiff amounting to negligence contributed to his damages.

TWENTY-FIFTH: That as a result of the negligence of the defendants Nusbaum and Winslow, plaintiff was damaged in the amount of Two Million Five Hundred Thousand Dollars (\$2,500,000).

**FOR A THIRD COUNT AGAINST DEFENDANTS
NUSBAUM AND WINSLOW PURSUANT TO
SECTION 10 OF THE 1934 ACT AND PURSUANT
TO RULE 10b-5 OF THE SEC.**

TWENTY-SIXTH: Plaintiff repeats and realleges each and every allegation contained in paragraphs numbered first through nineteenth.

TWENTY-SEVENTH: That the representations made by defendants Nusbaum and Winslow were false at the time they were made or defendants made such representations recklessly without knowing whether they were true or false, and the inducement of the plaintiff to guarantee the accounts as aforesaid constituted the employment of a manipulative and deceptive device which was part of a scheme and course of conduct which operated as a fraud upon the plaintiff in violation of Section 10 of the 1934 Act and of Rule 10b-5 of the SEC.

TWENTY-EIGHTH: That defendant Winslow knew or should have known, or as a control person within the meaning of Section 20 of the 1934 Act, was under the duty to know and be responsible for the acts, carelessness and fraudulent

Complaint

representations of defendant Nusbaum and to take reasonable supervisory precautions to avoid same.

TWENTY-NINTH: That by virtue thereof and of the facts as hereinafter alleged plaintiff was damaged in the amount of Two Million Five Hundred Thousand Dollars (\$2,500,000).

**FURTHER FACTS: THE ILLEGAL INCEPTION OF THE
P.R. AND L.G. ACCOUNTS AND FRAUDULENT
PRACTICES IN DEFENDANT WINSLOW'S
ROCHESTER OFFICE**

**FOR A FOURTH COUNT AGAINST DEFEN-
DANTS NUSBAUM AND WINSLOW PURSUANT
TO SECTIONS 6, 7 and 10 OF THE 1934 ACT,
REGULATION T, SEC RULE 10b-5 AND RULE
431 OF N.Y.S.E.**

THIRTIETH: Plaintiff repeats and realleges each and every of the allegations as contained in paragraphs numbered first through nineteenth.

THIRTY-FIRST: Upon information and belief during the several representations as hereinabove alleged defendants Nusbaum and Winslow had, unknown to the plaintiff, engaged in a consistent scheme and fraud whereby several registered representatives and employees of defendants Nusbaum and Winslow traded for their own accounts and for the accounts of various customers, in violation of the credit and margin requirements of Section 7 of the 1934 Act and of Regulation T promulgated thereunder by the Federal Reserve Board of the United States, in that they traded on their own accounts and induced and permitted their customers to trade on their accounts by making purchases with the excessive use of credit, in some cases by making no monetary payment at all, and by continuing to carry the purchased securities with the excessive

Complaint

use of credit in violation of the aforesaid laws and regulations and of the rules of the New York Stock Exchange promulgated thereunder pursuant to Section 6 of the 1934 Act, more particularly but not limited to Rule 431 of the N.Y.S.E.

THIRTY-SECOND: Upon information and belief, as part of the aforesaid scheme and fraud, all or substantially all of the securities existing in the P.R. and L.G. accounts on the 29th day of July, 1969, had been originally purchased and subsequently carried in the said accounts by the use of excessive credit or by no monetary payment at all in violation of the said laws, regulations and rules.

THIRTY-THIRD: That upon information and belief there were other fraudulent and manipulative practices carried on by defendants Nusbaum and Winslow for their own benefit and for the benefit of some of their employees and some of their customers, as yet unknown to this plaintiff.

THIRTY-FOURTH: That such practices were not only in violation of Section 7 of the 1934 Act, the rules and regulations promulgated thereunder and Rule 431 of N.Y.S.E. but were also such manipulative and deceptive devices and such fraud as to be in violation of Section 10 of the 1934 Act and of Rule 10b-5 thereunder.

THIRTY-FIFTH: That all of the defendants named herein knew or should have known of the consistent practices carried on by defendants Winslow, Nusbaum and various employees and customers thereof and were charged each with the control and supervision thereof and with the knowledge thereof.

THIRTY-SIXTH: At the time defendant Nusbaum made the representations as hereinabove alleged on July 29, 1969, and thereafter defendant Nusbaum did not disclose to plaintiff and plaintiff had no knowledge nor reasonable grounds for procuring the knowledge that any of the securities in the P.R. and L.G. accounts had been purchased or traded in violation of

Complaint

Section 7 of the 1934 Act or of any regulation or rule promulgated thereunder.

THIRTY-SEVENTH: That the failure to disclose the said conditions of the P.R. and L.G. accounts and the fraudulent manipulative practices which had theretofore generated and maintained the accounts, was a continuing fraud in violation of Section 10 of the 1934 Act and of Rule 10b-5 of the SEC.

THIRTY-EIGHTH: As a result of the said fraud and failure to disclose plaintiff was induced to guarantee the accounts and to subsequently consolidate the accounts as hereinafter alleged into plaintiff's consolidated account and plaintiff sustained liability for various margin and sell-out requirements of the guaranteed account causing his own account and securities therein to be sold and liquidated and causing plaintiff to incur the cost of sales commissions and taxes in relation thereto all to plaintiff's damage in the amount of Two Million Five Hundred Thousand Dollars (\$2,500,000).

**FURTHER FACTS: CONCERNING THE ILLEGAL
TRANSFER OF P.R. AND L.G. ASSETS AND
AGREEMENTS RELATING THERETO**

**FOR A FIFTH COUNT AGAINST DEFENDANTS
WINSLOW, NUSBAUM AND N.Y.S.E. IN FRAUD
UNDER SECTIONS 10 AND 15c OF THE 1934
ACT AND SEC RULE 10b-5**

THIRTY-NINTH: Plaintiff repeats and realleges each and every of the allegations as contained in Paragraphs numbered first through nineteenth and thirty-first through thirty-seventh.

FORTIETH: That as a consequence of the aforesaid violations, frauds and manipulative practices, the net worth of defendant Winslow became so impaired as to be in violation of the minimum requirements prescribed by N.Y.S.E. Rule 325 and Rule 15c3-1 of the SEC pursuant to, and the general

Complaint

business condition and reputation of defendant Winslow became so impaired and discredited that a liquidation of the assets and liabilities of defendant Winslow or a transfer thereof to purchasing companies became necessary and expedient for defendants Winslow, N.Y.S.E. and various other member firms of N.Y.S.E.

FORTY-FIRST: In the supervision and control of the liquidation and transfer of the said assets and liabilities of defendant Winslow, upon information and belief, defendant N.Y.S.E. arranged for and supervised the purchase of various assets and liabilities of Winslow by various other member firms.

FORTY-SECOND: That as a part of the said liquidation and sell-out of defendant Winslow, defendant Winslow induced and coerced plaintiff to execute an agreement with defendant Winslow surrendering certain of plaintiff's rights and arranging for a scheduled sell-out of plaintiff's securities, among other things, which agreement was void pursuant to Section 29 of the 1934 Act because of the continuing conspiracy and fraud as hereinabove alleged, because it was in contravention of Section 7 of the 1934 Act and the rules and regulations promulgated by the Federal Reserve Board in Regulation T and by N.Y.S.E. under Rule 431 relating to maintenance of margin.

FORTY-THIRD: In the said liquidation and sell-out, arranged as aforesaid, plaintiff was further induced and coerced to enter into further agreements arranging for the consolidation of plaintiff's account with the P.R. and L.G. accounts, which agreements were void because of the continuing fraud as hereinabove alleged and because the purpose thereof was to transfer improper accounts from defendant Winslow to defendant Shearson under the scheme and plan of liquidation and sell-out consented to and arranged by the defendant N.Y.S.E.

Complaint

FORTY-FOURTH: That because of the said scheme, plan and continuing fraud plaintiff was damaged in the amount of Two Million Five Hundred Thousand Dollars (\$2,500,000).

FOR A SIXTH COUNT AGAINST DEFENDANTS N.Y.S.E. AND SHEARSON PURSUANT TO SECTIONS 6, 7, 10 and 19 OF THE 1934 ACT, REGULATION T OF THE FEDERAL RESERVE BOARD, RULE 405 OF THE N.Y.S.E. AND RULE 10b-5 OF SEC

FORTY-FIFTH: Plaintiff repeats and realleges each and every allegation contained in paragraphs first, nineteenth, thirty-first through thirty-seventh, fortieth through forty-third.

FORTY-SIXTH: On or about the 26th day of September, 1969, after a complete review of the entire situation by defendant Shearson and by defendant N.Y.S.E. and with the assistance, supervision and direction of defendant N.Y.S.E. the account of the plaintiff which had previously been with defendant Winslow was transferred from defendant Winslow to defendant Shearson as a consolidated account containing the previous accounts of plaintiff and of the P.R. and L.G. as aforesaid.

FORTY-SEVENTH: At the time of said transfer of the consolidated account, defendants N.Y.S.E. and Shearson had or should have had actual knowledge that the P.R. and L.G. accounts, which were part of the plaintiff's consolidated account, were generated fully or almost fully in violation of Section 7 of the 1934 Act and of Regulation T promulgated thereunder, which accounts should have been liquidated rather than consolidated and transferred from defendant Winslow to defendant Shearson, all as a matter of law.

FORTY-EIGHTH: At the time of the said transfer of the consolidated account, defendants N.Y.S.E. and Shearson had or should have had actual knowledge that the consolidated account

Complaint

contained many securities which had been transferred to it from the P.R. and L.G. accounts, many of which securities were in large blocks of thinly traded issues and which had not been conservatively evaluated, under the market conditions then prevailing, all in violation of Rule 431 of the N.Y.S.E.

FORTY-NINTH: That defendant N.Y.S.E. participated in the illegal consolidation and transfer by supervising it, by permitting the consolidation and transfer, by use of a special exception of commissions upon the consolidation and transfer, by other direct supervisory and controlling acts, and by further knowledge and acquiescence therein.

FIFTIETH: Defendant Shearson had actual knowledge of the deficit of the P.R. and L.G. accounts and had or should have had actual knowledge of the fraudulent genesis of the said accounts by reason of the fact that defendant Shearson reviewed the accounts separately and was informed of the details of the said accounts, the guarantee and the consolidation thereof prior to accepting plaintiff's consolidated account on or about September 26, 1969, and, upon information and belief, by information received from defendants Winslow and N.Y.S.E..

FIFTY-FIRST: Both defendants N.Y.S.E. and Shearson knew or should have known that at the time of the said consolidation and transfer, plaintiff's account not only contained securities purchased in violation of law as aforesaid and not only contained accounts in deficit position, but also was a consolidated account already in violation of the margin rules of N.Y.S.E., Rule 431, and of the House Margin Rule of defendant Shearson in view of the character of the securities contained therein (because of the P.R. and L.G. accounts), and both defendants knew or should have known that such consolidation and transfer was likely to have resulted in a forced liquidation, sale and damage to this plaintiff if such consolidation and transfer of accounts was permitted.

A-15
Complaint

FIFTY-SECOND: At the time of the consolidation of the aforesaid accounts and transfer of the consolidated account to defendant Shearson, plaintiff was unaware that the P.R. and L.G. accounts had been improperly generated in violation of Regulation T, he was unaware of the consequences thereof and of the effect of consolidating the said accounts with his own, and he was unaware of the improper margin condition of the said accounts, as above alleged, and defendants N.Y.S.E. and Shearson failed to disclose and concealed these facts from him.

FIFTY-THIRD: Defendant N.Y.S.E. by its participation and supervision of the consolidation and transfer of said account and defendant Shearson by its acceptance of the said consolidated account violated Rules 405 and 431 of the N.Y.S.E., violated and perpetuated the original violation of Section 7 of the 1934 Act and of Regulation T thereunder, all of which operated as a fraud upon the plaintiff within the meaning of Section 10 of the 1934 Act and Rule 10b-5 thereunder, and further violated their duties to the public and this plaintiff all of which resulted in the ultimate liquidation of plaintiff's account, as hereinafter alleged, and the liability and payment by plaintiff to defendant Shearson of commissions therefor, all to plaintiff's damage in the amount of Two Million Five Hundred Thousand Dollars (\$2,500,000).

**FURTHER FACTS: IMPROPER ACTS OF SHEARSON
IN HANDLING PLAINTIFF'S ACCOUNT**

**FOR A SEVENTH COUNT AGAINST DEFEN-
DANT SHEARSON IN NEGLIGENCE**

FIFTY-FOURTH: Plaintiff repeats and realleges each and every allegation contained in paragraphs numbered forty-six through fifty-second.

FIFTY-FIFTH: At the time plaintiff's account was accepted by defendant Shearson the said account was at or below the

Complaint

minimum maintenance status required by defendant Shearson and by Rule 431 of N.Y.S.E. as hereinabove alleged.

FIFTY-SIXTH: Upon the initial transfer of plaintiff's account to defendant Shearson as hereinabove alleged, defendant Shearson informed the plaintiff that it would enforce the minimum maintenance requirements according to its own house rule and according to the aforesaid rule of the N.Y.S.E. and that, to do so, it would calculate plaintiff's margin status on each business day.

FIFTY-SEVENTH: Thereafter from time to time, and especially from approximately February 1, 1970, until May, 1970, defendant Shearson exercised such control and dominion over the said account that it informed the plaintiff through its employees that it was daily calculating the said margin status of plaintiff's account of a proper basis and that it was requiring such liquidations of securities therein as were necessary to maintain the said account in conformity with the requirement of Rule 431 of the N.Y.S.E. Plaintiff was informed by employees of defendant Shearson that the said defendant intended to maintain absolute control over the said account to maintain its margin without discretion on the part of the plaintiff and without the ability of the plaintiff to make any purchases, and by allowing the plaintiff only the right to select those securities which he wished to sell in order to meet, on a daily basis, the daily sales requirements which defendant Shearson had calculated as necessary to maintain the margin.

FIFTY-EIGHTH: It therefore became the custom of defendant Shearson's employee handling plaintiff's account to telephone plaintiff on an almost daily basis and advise him whether or not sales would be necessary and, if so, the dollar value of the amount of sales which would be necessary to maintain the account at the minimum margin as aforesaid. Plaintiff on a customary and daily basis would designate, in

Complaint

consultation with defendant's employee, those securities which plaintiff wished to sell in order to meet the dollar value amount specified by defendant Shearson. Other than for the selection of the specific securities plaintiff was told by the defendant Shearson and its employees that he had no control over the said account, was permitted to exercise none, and did exercise none.

FIFTY-NINTH: At all times herein alleged, and until on or about the 27th day of April, 1970, plaintiff believed that defendant was making the correct daily marginal calculations and requiring such sales of securities from plaintiff's account as were necessary to maintain the account at the minimum margin requirement as aforesaid and plaintiff relied upon the defendant for such calculations and control of his account and had no other reasonable grounds for any contrary knowledge or control thereof.

SIXTIETH: That on or about the 27th day of April, 1970, plaintiff was first advised by defendant Shearson through an employee thereof that his account was considerably below the minimum marginal requirement of defendant Shearson or of the aforesaid Rule of the N.Y.S.E. and was, in fact, at approximately four percent (4%). On or about that date, plaintiff was further advised that it would be necessary for defendant to completely liquidate plaintiff's account and such liquidation was undertaken by defendant Shearson without the permission or control or knowledge of the plaintiff.

SIXTY-FIRST: For the several months preceding April 27, 1970, plaintiff not only had no control over the conduct of his account, but further was given either no or insufficient information with respect thereto, even to the extent that statements of accounts for the months of February, March and April, 1970, were not provided to the plaintiff, despite objections on the part of the plaintiff and requests by him of the defendant for further information concerning the status of his account.

Complaint

SIXTY-SECOND: In the conduct and control of plaintiffs account as aforesaid defendant assumed upon itself a duty of care which it did not properly maintain.

SIXTY-THIRD: Without any contributing act of negligence or otherwise on plaintiff's part defendant so carelessly and negligently permitted plaintiff's account to deteriorate so that became in a deficit position.

SIXTY-FOURTH: That at the time defendant assumed control of the said account the net value of the account was, upon information and belief, approximately Two Million Dollars (\$2,000,000).

SIXTY-SIXTH: Had plaintiff been advised of the deteriorating condition of his said account he would have, and would have been in a position to, liquidate the said account in such an orderly basis that the account would never have become in deficit and plaintiff would not have been damaged by misconduct and negligence on the part of the defendant Shearson, as he was, in the amount of One Million Five Hundred Thousand Dollars (\$1,500,000).

FOR AN EIGHTH COUNT AGAINST DEFENDANT SHEARSON PURSUANT TO VIOLATIONS OF SECTIONS 6 AND 7 OF THE 1934 ACT AND RULE 431 OF N.Y.S.E.

SIXTY-SIXTH: Plaintiff repeats and realleges each and every allegation contained in paragraphs numbered and styled forty-sixth through fifty-third and fifty-fifth through sixty-second.

SIXTY-SEVENTH: That in allowing plaintiff's account to deteriorate into a deficit position, defendant Shearson violated Sections 6 and 7 of the 1934 Act, Regulation T of the Federal Reserve Board, and Rule 431 of N.Y.S.E. by permitting, not only by omission, but also by commission (having assumed absolute control of the account), the said account to be in violation of the aforesaid margin requirements.

Complaint

SIXTY-EIGHTH: That at the time defendant Shearson assumed control of plaintiff's account and allowed plaintiff's account to be in violation of the aforesaid rules and laws, the net value of plaintiff's account amounted to in excess of One Million Five Hundred Thousand Dollars (\$1,500,00) and plaintiff was therefore damaged in that amount.

**FOR A NINTH COUNT AGAINST DEFENDANT
SHEARSON IN FRAUD AND BREACH OF
FIDUCIARY DUTY**

SIXTY-NINTH: Plaintiff repeats and realleges each and every allegation contained in paragraphs numbered and styled forty-sixth through fifty-third and fifty-fifth through sixty-sixth.

SEVENTIETH: That by undertaking to control plaintiff's account as hereinabove alleged, by depriving plaintiff of that control, and by making the representations to plaintiff that it did, defendant Shearson assumed upon itself a degree and standard of conduct consistent with that of a fiduciary acting on behalf of plaintiff's interests.

SEVENTY-FIRST: That in allowing plaintiff's account to deteriorate into a deficit position, defendant Shearson was so grossly negligent and was guilty of such acts, practice and courses of business which amounted to fraud against the plaintiff and breach of fiduciary duty to the plaintiff upon which plaintiff relied.

SEVENTY-SECOND: That as a result of the said fraud and breach of fiduciary duty, plaintiff was damaged in the amount of One Million Five Hundred Thousand Dollars (\$1,500,000).

**FOR A TENTH COUNT AGAINST DEFENDANT
SHEARSON PURSUANT TO SECTION 10 OF THE
1934 ACT AND RULE 10b-5 OF THE SEC**

SEVENTY-THIRD: Plaintiff repeats and realleges each and every allegation contained in paragraphs forty-sixth through fifty-third, fifty-fifth through sixty-sixth, and seventy-second.

Complaint

SEVENTY-FOURTH: That plaintiff believed that defendant Shearson Hammill was controlling his account as said defendant said it was and was maintaining the requisite minimum margin prescribed by Rule 431 of the N.Y.S.E., all in accordance with defendant Shearson's representations. Defendant Shearson knew or should have known that plaintiff's account was not being properly maintained and made the contrary representations knowingly or recklessly without knowing whether they were true and without properly controlling plaintiff's account, which duty they had assumed.

SEVENTY-FIFTH: That the breach of the duty assumed, the representations made by defendant Shearson to the plaintiff, and the act of permitting plaintiff's account to fall far below minimum maintenance requirements and into a deficit position amounted to such gross negligence that it was a scheme and course of conduct to defraud and did, in fact, operate as a fraud and deceit upon the plaintiff, all within the meaning of, and prohibited by Section 10 of the 1934 Act and of Rule 10b-5 of the SEC.

SEVENTY-SEVENTY: That as a result thereof, plaintiff was damaged in the amount of One Million Five Hundred Thousand Dollars (\$1,500,000).

**FOR AN ELEVENTH COUNT AGAINST
DEFENDANT SHEARSON IN BREACH OF
CONTRACT**

SEVENTY-EIGHTH: Plaintiff repeats and realleges each and every allegation contained in paragraphs numbered and styled forty-fifth through fifty-second and fifty-fifth through sixty-sixth.

SEVENTY-NINTH: On or about the 26th day of September, 1969, plaintiff and defendant Shearson entered into a certain agreement wherein and whereby defendant Shearson agreed to maintain the said account subject to the constitution

Complaint

rules, regulations, customs and usages of the exchanges and market places upon which the securities were traded.

EIGHTIETH: That in allowing and causing plaintiff's account to violate the minimum margin requirements, and in improperly evaluating the securities therein on a conservative basis where applicable, all as aforesaid, defendant Shearson violated Sections 6, 7 and 19 of the 1934 Act, Regulation T of the Federal Reserve Board and Rule 431 of the N.Y.S.E., all of which constituted a breach of the aforesaid agreement resulting in damage to the plaintiff.

EIGHTY FIRST: That as a result of said breach plaintiff was damaged in the amount of One Million Five Hundred Thousand Dollars (\$1,500,000).

WHEREFORE, plaintiff demands judgment against defendants Frederick S. Nusbaum, the New York Stock Exchange and Winslow, Cohu & Stetson, Incorporated in the amount of Two Million Five Hundred Thousand Dollars (\$2,500,000), and against Shearson Hammill & Co., Incorporated in the amount of One Million Five Hundred Thousand Dollars (\$1,500,000), jointly and severly, with interest from the dates of damage and loss as alleged in the complaint, together with reasonable attorneys' fees and the costs and disbursements of this action and for such other and further relief as to this court may seem just and proper.

WISER, SHAW, FREEMAN, VANGRAAFEILAND,
HARTER & SECREST

Attorneys for Plaintiff

Office and Post Office Address

700 Midtown Tower

Rochester, New York 14604

Telephone: 232-6500

By: JOHN F. MAHON,
John F. Mahon, member of the
Firm and counsel.

**DEFENDANT SHEARSON, HAMMILL & CO.,
INCORPORATED'S MOTION TO DISMISS**

(SAME TITLE)

Defendant Shearson, Hammill & Co., Incorporated ("Shearson"), under Rule 12(b) of the Federal Rules of Civil Procedure, makes the following motions:

Motion to Dismiss Count 6 of the Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a cause of action because:

- a. plaintiff failed to allege facts sufficient to state a cause of action under 16 U.S.C. § 78j and Rule 10b-5 of the SEC (17 C.F.R. 240. 10b-5) promulgated thereunder;
- b. a violation of 15 U.S.C. §§ 78f and 78g does not, by itself, as a matter of law, give rise to private rights of action.
- c. a violation of New York Stock Exchange Rules 405 and 431 does not by itself give rise to a private right of action under the federal securities laws;
- d. plaintiff failed to allege facts sufficient to state a cause of action under 15 U.S.C. § 78g and Regulation T of the Federal Reserve Board (12 C.F.R. § 220) promulgated thereunder.

Motion to Dismiss Count 8 under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to plead facts sufficient to state a cause of action for violation of 15 U.S.C. §§ 78f and 78g, Regulation T of the Federal Reserve Board (12 C.F.R. § 220) and New York Stock Exchange Rule 431 because:

- a. a violation of 15 U.S.C. § 78f does not, as a matter of law, give rise to a private right of action;
- b. plaintiff has failed to allege facts sufficient to state a cause of action for violation of 15 U.S.C. § 78g and Regulation

*Defendant Shearson, Hammill & Co., Incorporated's
Motion to Dismiss*

T of the Federal Reserve Board (12 C.F.R. § 220)
promulgated thereunder;

- c. a violation of New York Stock Exchange Rule 431 does
not, as a matter of law, give rise to a private right of action
under the federal securities laws.

Motion to Dismiss Count 10 under Rule 12(b)(6) or in the
alternative Rule 56 of the Federal Rules of Civil Procedure for
failure to allege facts sufficient to state a cause of action under
15 U.S.C. § 78j; and Rule 10b-5 of the Securities and Exchange
Commission (17 C.F.R. § 240.10b-5).

Motion to Dismiss Counts 7, 9 and 11 under Rule 12(b)(1)
of the Federal Rules of Civil Procedure for lack of subject
matter jurisdiction.

NIXON, HARGRAVE, DEVANS & DOYLE

By /s/ HARRY P. TRUEHEART, III

Harry P. Trueheart, III

*Attorneys for Defendant Shearson, Hammill
& Co., Incorporated*

Office Address

Lincoln First Tower

Suite 2200

Rochester, New York 14603

716-546-8000

NOTICE OF MOTION

(SAME TITLE)

To Plaintiff and His Counsel:

PLEASE TAKE NOTICE that plaintiff will move this Court
at a motion term thereof before the Honorable Harold P. Burke,

Affidavit of Philip J. Hoblin, Jr.

272 United States Courthouse, 100 State Street, Rochester, New York 14614 at 10 A.M. on June 11, 1973, or as soon thereafter as counsel may be heard for an order dismissing Counts 6, 7, 8, 9, 10 and 11 of the Complaint as set forth in the foregoing motion.

Dated: May 22, 1973

NIXON, HARGRAVE, DEVANS & DOYLE

By /s/ HARRY P. TRUEHEART, III

Harry P. Trueheart, III

Attorneys for Defendant, Shearson,

Hammill, & Co., Incorporated

Office and P. O. Address

Lincoln First Tower

Suite 2200

Rochester, New York 14603

716-546-8000

AFFIDAVIT OF PHILIP J. HOBLIN, JR

(SAME TITLE)

STATE OF NEW YORK }
County of New York } ss:
City of New York }

PHILIP J. HOBLIN, JR., being duly sworn, deposes and says:

1. I am and have been at all times relevant to this action a Vice President and General Counsel of defendant Shearson, Hammill & Co., Incorporated ("Shearson"). I am fully familiar with the organization and operations of Shearson and the facts hereinafter set forth. I make this affidavit in support of Shearson's motion to dismiss Count 10 of the complaint.

Affidavit of Philip J. Hoblin, Jr.

2. I have reviewed the margin account agreement entered into between Shearson and plaintiff, Max. S. Gumer, on September 26, 1969, a copy of which is attached hereto and marked Exhibit A. Paragraph 1 of that agreement requires the plaintiff herein to maintain such margin as Shearson shall require in its discretion, and paragraph 11 provides that failure to insist on strict compliance with the agreement shall not constitute a waiver of any of Shearson's rights or privileges thereunder. In paragraph 10, plaintiff agreed to submit to arbitration controversies arising under the agreement.

3. I have reviewed the account statements of Max Gumer from October 1969 through June of 1970 and the complaint in the instant action.

4. Immediately following the transfer of plaintiff's account from defendant Winslow, Cohu & Stetson to Shearson, there were more than 180 different securities held by plaintiff in his margin account at Shearson.

5. Many of the securities in the margin account were thinly traded, speculative stocks whose prices were subject to wide variation in price.

6. During the period relevant to this lawsuit, the stock market experienced one of the severest declines in its history. In any such decline, volatile securities experience a relative greater decline in price than the market average.

7. Over the course of the months following transfer, until plaintiff's account was finally liquidated on or about June 1, 1970, more than 1,000 sales of securities were made from the account. The plaintiff in his complaint appears to put in issue the choice of each security sold as well as the amount and timing of each of these sales.

8. It was in anticipation of just such a controversy, where numerous transactions would be put in issue and where evidence

A-26

Affidavit of Philip J. Hoblin, Jr.

of the state of the stock market and the market for particular stocks would be necessary for a proper resolution of the controversy that Shearson, more than seven years ago included in its standard margin account agreement (which agreement is in the same form as the agreement signed by Max Gumer) an agreement to submit such controversies to arbitration. In so doing Shearson realized that it was in both Shearson's and its customers' interests to get a speedy and economical resolution of such controversies through the arbitration process.

/s/ PHILIP J. HOBLIN, JR.
Philip J. Hoblin, Jr.

Sworn to before me this
day of , 1973

SHEA

Name

☒ R

☐ B

Busin

Bank

Intro

Appro
Office

Office

HEARSON, HAMMILL & CO.

INCORPORATED

MARGIN ACCOUNT

Date 9-26-69

Office	Number	F	IE
695	4528	1	06

Soc. Sec. #
or

Tax Ident. # 064-28-9740

Name Mr. Max S. Gumer

☒ Residence 62 Knolbrook Rd. Rochester, NY Phone 654-0022
14610

☐ Business Address 2835 Monroe Avenue, Rochester, NY 14610
(Check address to be used for mail)

Business or Occupation Motel Owner
(Please give name of firm or corporation and position held)

King James Motel

Banking Connections Central Trust Co. Citizenship USA
(Name)

Main Branch, Rochester, NY
(Address)

Introduced by

Investment
Executive

Approved
Office Manager

Officer (Voting)

PLEASE FILL OUT & SIGN BOTH COPIES

PLEASE READ AND SIGN OTHER SIDE

15041 REV. 7/60 PTE. IN U.S.A. N.Y. COPY

MARGIN ACCOUNT AGREEMENT
EXHIBIT A

Affidavit of Philip J. Hoblin, Jr.

A-27

Affidavit of Philip J. Hoblin, Jr.

**CUSTOMER'S MARGIN AGREEMENT
SHEARSON, HAMMILL & CO.**

INCORPORATED

Gentlemen: 14 WALL STREET NEW YORK, NEW YORK 10005

I agree as follows with respect to my accounts which I have opened with you for the purchase and sale of securities and commodities:

1. I hereby represent that I am over 21 years of age; that I am not an employee, member or partner of any security or commodity exchange or member firm thereof, or of any corporation a majority of the stock of which is owned by any exchange; that I am not an employee of any bank, banker, trust company, insurance company or of any brokerage firm or corporation, association, firm or individual engaged in the business of dealing in securities or commodities, bills of exchange, acceptances or other forms of commercial paper.

2. The word "property" is used herein to mean securities of all kinds, commodities, and contracts for the future delivery of, or otherwise relating to, commodities or securities and all property usually and customarily dealt in by brokerage firms.

3. All transactions for my accounts shall be subject to the constitutions, rules, regulations, customs and usages (as the same may be constituted from time to time) of the exchange, market or place (and its clearing house, if any) where executed. Actual deliveries are intended on all transactions.

4. Any and all property belonging to me or in which I may have an interest held by you or carried in any of my accounts (either individually or jointly with others) shall be subject to a general lien for the discharge of my obligations to you, wherever arising and without regard to whether or not you have made advances with respect to such property, and without notice to me may be carried in your general loans and may be pledged, re-pledged, hypothecated, or re-hypothecated, separately or in common with other property, for the sum due to you thereon or for a greater sum and without retaining in your possession and control for delivery a like amount of similar property.

5. I will maintain such margins as you may in your discretion require from time to time and will pay on demand any debit balance owing with respect to any of my accounts. You may, in the event of my death or whenever in your discretion you consider it necessary for your protection, sell any or all property held in any of my accounts, cancel any open orders for the purchase or sale of any property with or without notice to me, and you may borrow or buy in any property required to make delivery against any sale effected for me. Such sale or purchase may be public or private and may be made without advertising or notice to me and in such manner as you may in your discretion determine, and no demands, calls, tenders or notices which you may make or give in any one or more instances shall invalidate the aforesaid waiver on my part. At any such sale you may purchase the property free of any right of redemption and I shall be liable for any deficiency in my margined accounts.

6. All transactions in any of my accounts are to be paid for or required margin deposited not later than 2 p.m. on the settlement date. I agree that any debit occurring in any of my accounts may be transferred by you at your option to my margin account. At any time and from time to time, you may, in your discretion, without notice to me, apply and/or transfer any property or equity therein, interchangeably between any of my accounts, whether individual or joint or from any of my accounts to any account guaranteed by me. You are specifically authorized to transfer to my cash account on the settlement date following any purchase made in that account, excess funds available in any of my other accounts to said cash account sufficient to make full payment of this cash purchase.

7. I agree to pay interest and service charges upon my accounts monthly at the prevailing rate, as determined by you.

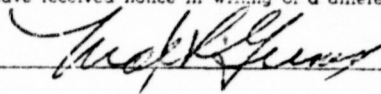
8. I agree that, in giving orders to sell, all "short" sale orders will be designated as "short" and all "long" sale orders will be designated as "long" and that the designation on a sale order as "long" is a representation on my part that I own the security, and if the security is not in your possession, that it is then impracticable to deliver the security to you forthwith and that I will deliver it as soon as possible.

9. This agreement and all the terms thereof shall be binding upon my heirs, executors, administrators, personal representatives and assigns. In the event of my death, incompetency or disability, whether or not executors, administrators, committee or conservators of my estate and property shall have qualified or been appointed, you may place orders for the sale of property which you may be carrying for me or buy any property of which my accounts may be short, or any part thereof, under the same terms and conditions as hereinabove stated, as though I were alive and competent, without prior notice to my heirs, executors, administrators, personal representatives, assigns, committee or conservators, and without prior demand or call of any kind upon them or any of them.

10. This agreement shall inure to the benefit of your successors and assigns, shall be binding on the undersigned, his heirs, executors, administrators and assigns, and shall be governed by the laws of the State of New York. Any controversy arising out of or relating to my account, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules, then in effect, of the American Arbitration Association or the Board of Governors of the New York Stock Exchange as I may elect. If I do not make such election by registered mail addressed to you at your main office within 5 days after demand by you that I make such election, then you may make such election. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

Affidavit of David W. Kelly

11. Your failure to insist at any time upon strict compliance with this agreement or with any of its terms or any continued course of such conduct on your part shall in no event constitute or be considered a waiver by you of any of your rights or privileges. Notice or other communications mailed to me at the address given on the reverse side shall, until you have received notice in writing of a different address, be deemed to have been personally delivered to me.

x 

Date: _____ Customer's Signature: x

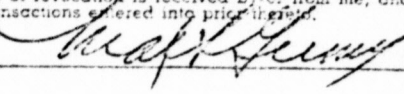
LENDING AGREEMENT

I hereby represent that I am over 21 years of age

You are hereby specifically authorized to lend, either separately or with other securities, to either yourselves as brokers or to others, any securities held by you on margin for my/our account(s) or as collateral therefor.

This agreement shall also inure to the benefit of your successors, by merger, consolidation or otherwise, and assigns, and you may transfer my account to any such successors or assigns.

This agreement shall continue until signed notice of revocation is received by or from me, and in case of such revocation it shall continue effective as to transactions entered into prior thereto.

x 

Date: _____ Customer's Signature: x

AFFIDAVIT OF DAVID W. KELLY

(SAME TITLE)

STATE OF NEW YORK }
County of New York } ss:
City of New York }

DAVID W. KELLY, being duly sworn, deposes and says:

1. I am and have been at all times relevant to this action First Vice President of the defendant Shearson, Hammill & Co., Inc. ("Shearson"). I am fully familiar with the organization and operations of Shearson and with the facts hereinafter set forth. I make this motion to dismiss Count 10 of the Complaint.

2. On February 9, 1971, pursuant to the margin account agreement entered into by Shearson and plaintiff Max Gumer on September 26, 1969 (Exhibit A to the Affidavit of Philip J. Hoblin, Jr. and Roger S. Richard) I sent a letter to Gumer (a copy of which is attached hereto as Exhibit A) demanding arbitration of the matters in controversy between Gumer and Shearson and requesting that Gumer elect to arbitrate either in

A-30

Affidavit of David W. Kelly

accordance with the Rules of the Board of Governors of the New York Stock Exchange or the American Arbitration Association.

3. By letter dated February 17, 1971 (a copy of which is attached hereto as Exhibit B) plaintiff Gumer refused to submit the controversy to arbitration.

/s/ DAVID W. KELLY
David W. Kelly

Sworn to before me this
day of _____, 1973

EXHIBIT A
LETTER OF DAVID W. KELLY
DATED FEBRUARY 9, 1971

February 9, 1971

Mr. Max Gumer
62 Knolbrook Road
Rochester, New York 14610

John Mahon, Esq.
Wiser, Shaw, Freeman, Van Graafeiland,
Harter & Secrest
700 Midtown Tower
Rochester, New York 14604

RE: *Max Gumer v. Shearson, Hammill & Co. Incorporated*

Gentlemen:

The undersigned, Shearson, Hammill & Co. Incorporated hereby demands pursuant to Paragraph 10 of the agreement between Shearson, Hammill & Co. Incorporated and Mr. Max Gumer dated September 26, 1969, copies of which are attached hereto that the dispute between Mr. Max Gumer and Shearson,

Affidavit of David W. Kelly

Hammill & Co. Incorporated be submitted to arbitration in accordance with the rules of either the Board of Governors of the New York Stock Exchange or the American Arbitration Association, and that said dispute referred to is the one between Mr. Max Gumer and Shearson, Hammill & Co. Incorporated whereby Mr. Max Gumer has refused to pay the sum of \$170,212.04 plus interest charges which are due and owing to Shearson, Hammill & Co. Incorporated.

Under the terms of the agreement referred to above, demand is hereby made that you, Mr. Max Gumer, elect whether the arbitration shall take place in accordance with the rules of the Board of Governors of the New York Stock Exchange or the American Arbitration Association and further, if you do not make such election by return receipt addressed to the undersigned at Shearson, Hammill & Co. Incorporated at its main office, 14 Wall Street, New York, New York 10005 within five (5) days after receipt of this notification, Shearson, Hammill & Co. Incorporated will thereupon exercise its right of election and request submission of its claim to the tribunal it so elects.

Very truly yours,

/s/ DAVID W. KELLY
David W. Kelly
First Vice President

/mmd

REGISTERED MAIL
RETURN RECEIPT REQUESTED

Affidavit of David W. Kelly

**EXHIBIT B
LETTER OF MAX S. GUMER
DATED FEBRUARY 17, 1971**

Mr. Max S. Gumer
62 Knollbrook Road
Rochester, New York 14610
February 17, 1971

Registered Mail
Return Receipt Requested

David W. Kelly
First Vice-President
Shearson Hammill & Co., Inc.
14 Wall Street
New York, New York 10005

Re: *Max S. Gumer v. Shearson Hammill & Co., Inc.*

Dear Mr. Kelly:

I am in receipt of your letter of February 9, 1971, which was received by me on February 12, 1971.

The dispute referred to in your letter exceeds the sum referred to therein, and I am advised by my counsel that the dispute which exists between us involves certain Federal questions arising by virtue of your violation of the Federal Securities Laws, and Federal Securities Rules and Regulations and New York Stock Exchange Rules and Regulations promulgated thereunder. I am further advised by counsel that the Federal law relating to the dispute between us prohibits waiver of my judicial remedy and enforcement of the arbitration clause of the agreement referred to in your letter, and I have therefore instructed my counsel to proceed with such judicial remedy rather than by way of arbitration. I do not, therefore, deem the controversy and dispute existing between us as arbitrable.

Affidavit of Roger G. Richard

Should, however, the judiciary conclude that there is no Federal question involved in the dispute which exists between us, and should I be required to proceed by way of arbitration, then under those conditions I elect to proceed with arbitration in accordance with the rules of the American Arbitration Association.

Very truly yours,

/s/ MAX S. GUMER
Max S. Gumer

jvs

AFFIDAVIT OF ROGER G. RICHARD

(SAME TITLE)

STATE OF NEW YORK }
County of Monroe } ss:
City of Rochester }

ROGER G. RICHARD, being duly sworn, deposes and says:

1. I am and at all times relevant to this action have been the manager of the Rochester office of defendant Shearson, Hammill & Co., Inc. ("Shearson"). I am fully familiar with the organization and operations of Shearson and with the facts hereinafter set forth. I make this affidavit in support of Shearson's motion to dismiss Count 10 of the complaint.

2. On September 26, 1969, plaintiff, Max Gumer, entered into a margin account agreement with Shearson, a copy of which is attached hereto and marked Exhibit A. I signed that agreement on behalf of Shearson.

Affidavit of Roger G. Richard

3. On or about September 26, 1969, at the request of plaintiff and his attorney, Shearson accepted the transfer from Winslow, Cohu & Stetson, Inc. ("Winslow") of securities which had been held in plaintiff's account at Winslow.

4. Immediately following the transfer there were more than 180 different securities held by plaintiff in his margin account at Shearson.

5. Over the course of the months following transfer of plaintiff's account, until it was finally liquidated on or about June 1, 1970, more than 1,000 sales of securities were made from that account.

/s/ ROGER G. RICHARD
Roger G. Richard

Sworn to before me this 23rd
day of May, 1973.

/s/ HARRY P. TRUEHEART, III
HARRY P. TRUEHEART, III
Notary Public in the State of New York
MONROE COUNTY, N. Y.
Commission Expires March 30, 1975.

EXHIBIT A
MARGIN ACCOUNT AGREEMENT
(Same as printed herein at page 27)

**DECISION AND ORDER OF
HON. HAROLD P. BURKE**

(SAME TITLE)

Wiser, Shaw, Freeman, VanGraafeiland, Harter & Secrest,
700 Midtown Tower, Rochester, N. Y. 14604, *Attorneys for
plaintiff*

Nixon, Hargrave, Devans & Doyle, Lincoln First Tower,
Rochester, N. Y. 14603, *Attorneys for defendant Shearson,
Hammill & Co. Inc.*

This suit grows out of securities accounts, including a margin account, which plaintiff maintained with defendant Winslow, Cohu & Stetson. The accounts were transferred to Shearson, Hammill & Co. Inc. at plaintiff's request.

When the accounts were transferred to Shearson, plaintiff entered into an agreement which provided in part as follows:

"10. . . Any controversy arising out of or relating to my account, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect, of the American Arbitration Association or the Board of Governors of the New York Stock Exchange as I may elect. If I do not make such election by registered mail addressed to you at your main office within five days after demand by you that I make such election, then you may make such election. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof. (See affidavit of Roger G. Richard, Exhibit A.)"

Shearson demanded that the plaintiff make such election. He refused to do so and has refused to proceed with arbitration. Plaintiff then brought this suit.

Decision and Order of Hon. Harold P. Burke

By motions filed May 29, 1973 Shearson moved to dismiss Count 6 of the complaint for failure to state a cause of action on grounds particularly stated; to dismiss Count 8 for failure to plead facts sufficient to state a cause of action for violation of 15 U.S.C. Sections 78f and 78g, Regulation T of the Federal Reserve Board (12 C.F.R. Section 220) and New York Stock Exchange Rule 431 on grounds particularly stated; to dismiss Count 10 under Rule 12(b)(6) or in the alternative Rule 56 of Federal Rules of Civil Procedure for failure to allege facts sufficient to state a cause of action under 15 U.S.C. Section 78j; and Rule 10b-5 of the Securities and Exchange Commission (17 C.F.R. Section 240.10b-5); and to dismiss Counts 7, 9 and 11 under Rule 12(b)(1) of Federal Rules of Civil Procedure for lack of subject matter jurisdiction.

Although the complaint contains eighty-one paragraphs there are essentially but two events which are claimed to be the basis of Shearson's liability under the Securities Exchange Act, viz, the transfer of plaintiff's account from Winslow to Shearson and the course of trading in plaintiff's account at Shearson following the transfer.

Count 6 alleges that in accepting as transferee an account with some securities positions generated in violation of Regulation T, Shearson violated Regulation T. Count 8 essentially charges that Shearson, as transferee, succeeded to Winslow's duty to liquidate securities positions generated in violation of Regulation T and in failing to do so Shearson committed a further violation. Paragraph forty-two of the complaint makes no reference to Shearson. It alleges primarily that Winslow induced plaintiff to execute a guarantee. Paragraph forty-three has no allegation of any acts on the part of Shearson. The gist of the complaint so far as it purports to show a violation of Regulation T are found in paragraphs forty-seven and fifty-three wherein it is alleged that Shearson had or should have had actual knowledge "that the P.R. and L.G. accounts,

Decision and Order of Hon. Harold P. Burke

which were part of the plaintiff's consolidated account, were generated fully or almost fully in violation of Section 7 of the 1934 Act and of Regulation T promulgated thereunder ----" and that Shearson by its acceptance of the consolidated accounts violated Rules 405 and 431 of the New York Stock Exchange and violated and perpetuated the original violation of Section 7 of the 1934 Act and of Regulation T, all of which operated as a fraud on the plaintiff within the meaning of Section 10 of the 1934 Act and Rule 10b-5 thereunder. This is a bare conclusory pleading devoid of any facts constituting fraud.

In support of Shearson's alleged duty plaintiff relies on Sections 6(c) and (d), 7(a) and (b) of Regulation T.

Section 6(c) deals with the effect of a guarantee of a customer's account for Regulation T purposes. The complaint does not allege that Shearson was in any way connected with the guarantee given by plaintiff to Winslow for the P.R. and L.G. accounts. There is no basis for Shearson's claimed liability for violation of Section 6(c).

The complaint does not allege that there were purchases after the transfer. The consolidation of the accounts took place at Winslow (paragraph forty-three). There are no allegations in the complaint sufficient to state a cause of action for violations of either Section 6(d)(1) or Section 6(d)(2). Neither of the said subsections has any application to the facts alleged in the complaint.

Section 7(a) relates to the arrangement for credit for a customer. The complaint does not allege a violation by Shearson of Section 7(a). Section 7(b) expressly excludes from the scope of Regulation T any requirements involving the maintenance of margin. The complaint does not allege a violation by Shearson of Section 7(b).

The complaint has not stated a cause of action for any violation of Regulation T. The allegations contained in Count 8

Decision and Order of Hon. Harold P. Burke

in so far as they relate to a violation of Regulation T, do not state a cause of action.

Count 6 does not allege facts sufficient to constitute a cause of action under the Securities Exchange Act for violations of Rule 405 of the New York Stock Exchange. The facts alleged as a basis for Shearson's violation of Rule 405 are not tantamount to fraud. Compare *Buttrey vs. Merrill, Lynch, Pierce, Fenner and Smith*, 410 F.2d 135 (cert. den.) 396 U.S. 838.

The facts alleged in Count 8 of the complaint do not state a cause of action under the Securities Exchange Act for violation of Rule 431 of the New York Stock Exchange.

Count 6 alleges that Shearson violated Rule 10b-5 by accepting the transfer of plaintiff's account from Winslow. The facts pleaded in Count 6, as distinguished from the conclusions, are not sufficient to state a cause of action for violations of Rule 10b. As pointed out above the complaint has not alleged facts which connect Shearson with the consolidation of the accounts. Count 6 has failed to plead a scheme or a course of conduct which constitute a violation of Rule 10b-5 by Shearson.

The complaint alleges (paragraph seventy-five) that Shearson's allowing the account to fall below minimum margin requirements and into a deficit position was in violation of Section 10 of the 1934 Act and of Rule 10b-5. There are no allegations of fact in the complaint "amounting to scienter, intent to defraud, reckless disregard for the truth, or knowing use of a device, scheme or artifice to defraud ----". *Shemtob vs. Shearson, Hammill and Co.* 448 F.2d 442, 445 (2 cir.). Count 10 does not properly plead a cause of action for violation of Section 10(b) of the Exchange Act or of Rule 10b-5.

Since Counts 6, 8 and 10 have not pleaded facts sufficient to constitute violations of the Securities Exchange Act or Rules enacted thereunder, or of any violations over which this court

Notice of Appeal

has independent jurisdiction, this court does not have pendent jurisdiction over the common law claims set forth in Counts 7, 9 and 11.

All of the causes of action purporting to allege liability of Shearson to the plaintiff are dismissed.

In the concluding paragraph of the plaintiff's brief in opposition to the motion to dismiss the complaint the plaintiff states, "Should the court conclude that the pleadings do not adequately set out the facts, we respectfully request that, in the interest of justice, plaintiff be granted leave to amend." I decline to grant leave to amend the complaint.

ALL OF THE ABOVE IS SO ORDERED.

/s/ HAROLD P. BURKE

Harold P. Burke

United States District Judge

Apr. 1, 1974.

NOTICE OF APPEAL

(SAME TITLE)

Notice is hereby given that MAX S. GUMER, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the Order of Honorable Harold P. Burke dated the first day of April, 1974 and entered in the office of the Clerk of this Court on the second day of April, 1974, which Order dismissed all of the causes of action of the above named plaintiff against defendant SHEARSON, HAMMILL & CO., INC., and which Order declined to grant leave to plaintiff to amend his complaint and the above named plaintiff hereby appeals from each and every part of said Order.

Notice of Appeal

Dated: April 29, 1974.

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CERTIFICATION OF SERVICE

I hereby certify that I, this day, caused one copy of the attached appendix of the appellant to be served upon defendant Shearson Hammill & Co., Incorporated, defendant New York Stock Exchange and defendant Nusbaum by delivering a copy thereof to the office of the counsel of each such defendant, and upon defendant Winslow, Cohu and Stetson, Incorporated, by causing a copy thereof to be mailed to its counsel at his office address. The counsel and their addresses to which the said copies were delivered and mailed were as listed in the said appendix.

July 22, 1974.


John F. Mahon
Counsel for Appellant